IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of N. DENYSE COOK-WHITLATCH COURTER, Appellant, and JEFFREY A. WHITLATCH, Respondent.	)	No. 54534-5-I **DIVISION ONE** UNPUBLISHED OPINION FILED: July 17, 2006

APPELWICK, C.J. — This case involves child support. The parties' marriage was dissolved in 1997. The mother filed a petition for modification in December 2003. She sought inclusion of certain income in the child support calculation, retroactive adjustment of child support based on court-ordered periodic adjustments, orders of postsecondary support for the children, and other relief. The trial court granted the mother partial relief, and she appeals. We vacate the restriction on future enforcement of the previously ordered adjustments of support, and otherwise affirm.

FACTS

N. Denyse Cook-Whitlatch Courter[1] and Jeffrey Whitlatch are the parties to this appeal. Their marriage was dissolved on October 23, 1997. Jeff and Denyse stipulated to a division of property giving 45 percent of the parties' assets to Jeff and 55 percent to Denyse. Their primary assets were Microsoft stock options in Jeff's name and the family home, which was unencumbered. The parties decided that Denyse would get the family home with a stipulated value of $575,000. To compensate for the home, Jeff was given additional stock options that would net him, after taxes, about $470,000. The number of stock options representing that sum was determined based on the closing price of the stock at the time of the property division. The remainder of the stock options was divided between the parties according to the 45-55 split upon which they agreed. The parties also agreed to spousal maintenance for four years.

The parties went through a two-week trial to determine the parenting plan for their four then-minor children. The trial court decided that it was in the children's best interest to reside a majority of the time with Jeff. The trial court then addressed the issue of child support: "Child support should be ordered to be paid by the parties using the father's actual income based upon his salary and the mother's maintenance. I'm satisfied that those are the only two incomes that should be inputted into the formula." The trial court noted that in making child support calculations, income would not be imputed to Denyse while she

[1] Denyse was previously known as N. Denyse Whitlatch. For clarity sake we will refer to the parties by their first names through out this opinion. No disrespect is intended.

was receiving maintenance, but that if Denyse became employed her income would be used in the calculation, and income would be imputed to her if Denyse continued to be unemployed when maintenance terminated.

The dissolution decree carefully described the process by which Jeff and Denyse would cooperate in exercising the stock options. Because Microsoft stock options are non-transferable and were held in Jeff's name, the options granted to Denyse remained in Jeff's name until she provided Jeff with written authorization to exercise the options. Thus, whether Jeff was exercising his options or Denyse's options, the proceeds would appear as his income for tax purposes. The court decree set forth a detailed method by which the parties would offset the tax consequences to Jeff of exercising the stock options when he exercised Denyse's options at her request.

Consistent with its oral ruling, the trial court entered an order of child support (OCS) on October 23, 1997. The OCS included the following provisions on adjustments and amounts to be included in income:

> 3.15 PERIODIC ADJUSTMENT.
>
> Child support shall be adjusted periodically as follows:
>
> > Every two years beginning July of 1999. The parties shall exchange completed tax returns, including all schedules, by June 1, 1999.
> >
> > Mother's income shall be based on actual income and maintenance, when mother's maintenance ceases, then income shall be imputed to her.
> >
> > Father's income for child support shall not include any income as a result of the exercise of Microsoft stock options.

The OCS also included the following provision on postsecondary support:

> 3.13 POST SECONDARY EDUCATIONAL SUPPORT.
>
> The parents shall contribute to the post-secondary educational support of the children. Post-secondary educational support provisions will be decided by agreement or by the court.

The OCS required Denyse to make a monthly transfer payment of $864 to Jeff for child support.

Denyse sought review in this court of the Parenting Plan, the trial court's findings and conclusions, the dissolution decree, and the OCS. The parties ultimately reached a settlement and agreed to a parenting plan under which the children resided a majority of time with Denyse. A new OCS was entered in 1998 changing the child support amount and requiring Jeff to pay Denyse child support of $953.70 per month. The language in paragraphs 3.13 and 3.15 remained identical between the 1997 OCS and 1998 OCS. This court subsequently dismissed Denyse's appeal as controlled by the terms of the parties' settlement agreement.

On December 1, 2003, Denyse petitioned the King County Superior Court for modification of child support on the ground that "there has been a change in the income of the parents." Among the reasons for modifying child support, she asked for enforcement of the periodic adjustments ordered in the OCS, asked the court to invalidate the language of the OCS excluding income from the exercise of stock options from Jeff's income, and asked the court to establish postsecondary educational support provisions for the children.

The trial court found cause for modification because the order was more than two years old and the parents' income had changed, and that one of the children was now in a new age category for support purposes. The trial court modified the child support based on Jeff's increased monthly income as to the one child who was still a minor at the time Denyse filed her petition. The trial court refused to include income from exercise of stock options in its calculations of child support, and imputed income to Denyse for full-time employment. Although the parties' combined income exceeded $7,000, the trial court noted that "[t]here was no need to extrapolate child support beyond the $7,000 advisory amount as the court is confident that the father's support amount at this time is sufficient for the basic needs of the child."

The trial court ordered the parents to pay postsecondary educational support for the three children who were under age 23 in the same proportion as basic child support and limited the payments to the cost of in-state public institutions:

> As to the children, Franklin Whitlatch, Frank Cook, and Caleb Whitlatch all requirements of RCW 26.19.090 shall apply. The parents shall contribute to their children's post secondary education based on their percentage income as determined by Line 6 of the Washington State Support Schedule and Worksheets, the actual cost of the post secondary education as published by that institution which shall not exceed the cost of a public education like the University of Washington.

The trial court refused to order any postsecondary support for Matthew, who was over 23 years old when Denyse brought the petition.

The trial court refused to consider the adjustment of child support for prior years as required in the previous OCS because Denyse brought a petition for modification, not a motion to compel court-ordered adjustments. In its order on modification, the trial court specified:

> The parties on any Motion to adjust child support to the Family Law Motion's calendar are to be bound to the law of this case and Judge Wesley's Order of Child Support signed by Court Commissioner Stephen Gaddis and dated September 30, 1998 and the party must provide proof to that calendar, that all the conditions of the adjustment request were met. Specifically, that they did in fact exchange the information that was required to each other in advance each year to be adjusted.

The trial court denied Denyse's motion for reconsideration, and Denyse appeals.[2]

ANALYSIS

I. The Trial Court Did Not Err in Excluding Income From the Exercise of Stock Options in Determining the Modified Child Support Amount

Denyse argues that the trial court erred in upholding language in the OCS excluding income from the exercise of stock options from Jeff's income. The 1997 OCS contained the language restricting consideration of income from the exercise of stock options from child support calculations. Denyse filed an appeal of that order when it was entered. However, the parties reached a settlement and the appeal was dismissed as a result of that settlement. The 1998 OCS adopted as part of that settlement included the identical restrictive language.

In Marriage of Trichak, 72 Wn. App. 21, 22, 863 P.2d 585 (1993), neither

[2] It appears that Denyse also filed a motion for revision, which was assigned to a trial judge. The fate of the motion for revision does not appear in the record.

party appealed the decree of dissolution that offset the father's child support obligation by the amount of social security benefits received by the parties' developmentally disabled child. The Trichak court held that "[w]hile continuing jurisdiction in child custody and support matters is necessary to ensure that all matters affecting the needs of children are addressed, it is not the proper forum for relitigating previously decided legal issues that are unrelated to such needs." Trichak, 72 Wn. App. at 24. The Trichak court concluded that the mother was barred from relitigating the propriety of the offset because she did not challenge the 1989 decree when it was entered. Trichak, 72 Wn. App. at 24.

Similarly, here Denyse seeks to invalidate language in the 1998 OCS. That OCS was entered in the original litigation and was retained in relevant part as part of the settlement that resulted in the dismissal of Denyse's appeal. The 1998 OCS contained the restriction on use of income from exercise of stock options in calculating the parties' child support obligations. Because the options were non-transferable and remained in Jeff's name, they appear as his income for federal income tax purposes when exercised regardless of whether he or Denyse was exercising options. Although Denyse argues that there is no provision excluding stock option proceeds from her income from the child support calculation, the trial court excluded all income from the exercise of either party's stock options from its calculation. We agree with this interpretation of the restriction. This restriction is the law of the case, and the trial court did not err in upholding it.

Moreover, even if the provision were voidable at this time, the trial court has statutory discretion to deviate from the standard calculation of child support based on nonrecurring income:

> Nonrecurring income. The court may deviate from the standard calculation based on a finding that a particular source of income included in the calculation of the basic support obligation is not a recurring source of income. Depending on the circumstances, nonrecurring income may include overtime, contract-related benefits, bonuses, or income from second jobs. Deviations for nonrecurring income shall be based on a review of the nonrecurring income received in the previous two calendar years.

RCW 26.19.075(1)(b). The trial court's decision to deviate from the standard calculation is discretionary. RCW 26.19.075(4); Marriage of Lee, 57 Wn. App. 268, 277, 788 P.2d 564 (1990). It would have been within the trial court's discretion to exclude the income on this basis as well.

The inclusion of stock option income in Marriage of Ayyad, 110 Wn. App. 462, 38 P.3d 1033 (2002), is distinguishable. First, in that case, "it [did] not appear that the treatment of exercised stock options was particularly at issue at the time of the dissolution decree." Ayyad, 110 Wn. App. at 469 n.2. To the contrary, the treatment of stock options and their division was manifestly at issue at the time the parties' property was divided in this case, as reflected in the property settlement agreement, the offset of stock options in favor of Jeff to balance the grant of the family home to Denyse, and the detailed conditions placed on the distribution and exercise of the options. Second, the stock options at issue in Ayyad involved grant dates, vesting dates, and exercise dates

subsequent to the original decree. Ayyad, 110 Wn. App. at 469 n.2. Thus, in the Ayyad dissolution they were not considered property but represented post-decree income. The options at issue here were specifically distributed as property during the dissolution process. Whereas the Ayyad court therefore distinguished Trichak and concluded that the law of the case doctrine did not apply under its facts, see Ayyad, 110 Wn. App. at 469 n.2, the doctrine does apply here.

II. The Trial Court Did Not Abuse Its Discretion in Imputing Income to Denyse

RCW 26.19.071(6) requires the court to impute income to a parent who is voluntarily unemployed or underemployed. The 1998 OCS requires income be imputed to Denyse after her maintenance ceased. In her petition for modification, Denyse did not argue that she was involuntarily unemployed. Instead, in her declaration in support of her petition, Denyse stated that she was attending and would like to continue attending school. Although she asserted that attending school would increase her employment and earning prospects, this reflects voluntary, not involuntary, unemployment. Under these facts, the trial court did not abuse its discretion in upholding the OCS requirement that income be imputed to Denyse.

III. The Trial Court Did Not Abuse Its Discretion in Refusing to Extrapolate Child Support Beyond the Statutory Amount

Denyse argues that the trial court erred in refusing to extrapolate child support beyond the $7,000 advisory amount. However, the trial court

specifically found that the remaining minor child's basic needs were being met by the advisory amount and there was no need to exceed this amount. The amount of child support rests in the sound discretion of the trial court. Marriage of Stern, 57 Wn. App. 707, 717, 789 P.2d 807 (1990). If the children do not need child support exceeding the statutory maximum, the court cannot award support exceeding the advisory number. Marriage of Rusch, 124 Wn. App. 226, 233, 98 P.3d 1216 (2004). Denyse has not shown that the trial court abused its discretion in refusing to extrapolate beyond the advisory amount.

IV. The Trial Court Did Not Abuse Its Discretion In Deferring An Order Compelling Court-Ordered Adjustments To A Later Motion Before The Family Law Motions Calendar, But Did Abuse Its Discretion In Imposing Restrictions On A Later Motion Since That Issue Was Not Before The Court

Denyse argues that the trial court erred in refusing to adjust child support effective on the adjustment dates set forth in the 1998 OCS. The trial court refused to order any adjustments of child support because Denyse brought a petition for modification, and did not file a motion for adjustment. The trial court noted:

> This is a petition for mod. I have indicated I'm not on the family law motions calendar. I reject the argument by counsel that you can roll a bunch of issues into a case and set it on a calendar and it becomes a motion. It's not. This is a trial calendar.

Under RCW 26.09.170(1),

> [T]he provisions of any decree respecting maintenance or support may be modified: (a) Only as to installments accruing subsequent to the petition for modification or motion for adjustment except motions to compel court-ordered adjustments, which shall be effective as of the first date specified in the decree for implementing the adjustment.

The King County Local Rules permit a trial court to grant an adjustment in a child support modification proceeding if the requirements for an adjustment are met but the requirements for a modification are not. King County Local Family Law Rule (LFLR) 14(a)(4). While the rule permits an adjustment when a modification fails, this is not the same as requiring the trial court, in a modification proceeding, to enforce previously ordered but not implemented adjustments. The local rules require a party seeking to implement or enforce a periodic adjustment clause to file a motion in a specific calendar:

> A child support adjustment, which merely implements a periodic adjustment clause in an Order of Child Support or is limited to the relief authorized by RCW 26.09.170(9) and (10), shall be brought on the Family Law Motions Calendar under LFLR 6. Each party must also follow LFLR 10.

LFLR 14(a)(3).

Under the local rules, the trial court did not abuse its discretion in reserving the question of compelling court-ordered adjustments for a future action before the Family Law Calendar. Either party is entitled to seek enforcement of the court-ordered periodic adjustment in the 1998 OCS by bringing a motion under LFLR 14(a)(3).

However, because the trial court exercised its discretion not to address the enforcement of court-ordered periodic adjustments, it was an abuse of discretion to issue an order requiring the parties to prove that they had exchanged the relevant tax documents in advance of each adjustment year stated in the 1998 OCS (every two years starting in 1999). The 1998 OCS is an

existing order of periodic adjustment. Nothing in the language of the 1998 OCS notifies the parties that they waive the court-ordered adjustments by failing to comply with the requirement that they exchange tax information prior to the adjustment date. Nor does the statute provide that an adjustment is waived by failure to exchange information prior to the scheduled adjustment date. The parties' failure to comply with the information exchange requirements of that order does not invalidate the order as a matter of law. The ruling was premature, and we vacate this restriction.

Furthermore, under RCW 26.09.170(1)(a), court-ordered periodic adjustments can be enforced effective on the date ordered by the OCS. See also Ayyad, 110 Wn. App. at 471 n.3.

> Nevertheless, a court can decline to [order adjustments retroactively] on the basis of laches, or other recognized equitable grounds, and a long delay in seeking to enforce an automatic periodic adjustment might, in some cases, justify prospective adjustment only.

Ayyad, 110 Wn. App. at 471 n.3. Such determinations will be made by the Family Law Motions Calendar if a party brings a motion to compel court-ordered adjustments. Contrary to Jeff's argument, Denyse's request to compel a court-ordered adjustment does not require a showing of "evidence to support the necessity of being required to compel Jeff to make a support adjustment." Instead, such a request asks the court to make an adjustment in accord with its prior order of periodic adjustment. A court has the authority to enforce its own automatic adjustment clauses as previously ordered. RCW 26.09.170(1)(a);

Ayyad, 110 Wn. App. at 471 n.3. The order to make periodic adjustments already exists; the motion to compel asks the court to enforce it.

In this case, if either party brings a motion to compel, the child support calculations will be controlled by the law of the case. If the court enforces the previously ordered adjustments, all income from the exercise of stock options must be excluded. The adjustments must reflect changes in the parties' income, changes in the ages of the children, and changes in the number of minor children. After Jeff's obligation is determined, payments he has made will be credited against the obligation to determine any outstanding child support amounts owed. Jeff asserts that he has overpaid child support over the years. If, upon calculation of the adjusted support amounts, the trial court determines that Jeff overpaid child support, it may exercise its discretion on the issue of excess payments. Marriage of Stern, 68 Wn. App. 922, 932-33, 846 P.2d 1387 (1993). In exercising that discretion, the

> court should take into account the amount of the excess payments, whether the payments have already been spent in support of the child, and whether the sum is readily available for restitution without causing undue hardship upon the receiving parent or the child.

Stern, 68 Wn. App. at 932.

V. The Trial Court Did Not Err or Abuse Its Discretion In Its Orders Relating to Postsecondary Educational Support

The 1998 OCS set out an obligation on the parents to provide postsecondary support for the children:

3.13 POST SECONDARY EDUCATIONAL SUPPORT.

> The parents shall contribute to the post-secondary educational support of the children. Post-secondary education support provisions will be decided by agreement or by the court.

The trial court concluded that it had no authority to retroactively address postsecondary issues not brought before it prior to the filing of the petition for modification, and that it did not have jurisdiction to address postsecondary education issues as to Matthew because he was already 23 years old when the petition was filed. As to the other three children, the trial court ordered that "all requirements of RCW 26.19.090 shall apply." The trial court further ordered that

> The parents shall contribute to their children's post secondary education based on their percentage income as determined by Line 6 of the Washington State Support Schedule and Worksheets, the actual cost of the post secondary education as published by that institution which shall not exceed the cost of a public education like the University of Washington.

Denyse argues that nothing in the 1998 OCS limited the parents' contribution to the children's postsecondary education to the cost of a public education. Denyse is correct. But the grant of postsecondary support is discretionary with the trial court. RCW 29.19.090(2) provides that the "court shall exercise its discretion when determining whether and for how long to award postsecondary educational support" and provides some factors for the court to consider in exercising that discretion. The court has broad discretion to order support for postsecondary education. Childers v. Childers, 89 Wn.2d 592, 601, 575 P.2d 201 (1978); see also Marriage of Newell, 117 Wn. App. 711, 718, 72 P.3d 1130 (2003); Marriage of Kelly, 85 Wn. App. 785, 795, 934 P.2d 1218

(1997) (citing Childers). That discretion is abused when exercised on untenable grounds or for untenable reasons. Newell, 117 Wn. App. at 718.

The 1998 OCS establishes the parents' obligation to contribute to postsecondary expenses. However, it is not sufficiently specific to set forth the nature or extent of the obligation and to create an enforceable order. Here, there is no subsequent agreement of the parties to evaluate or enforce. The trial court has broad discretion in determining the extent of the grant of such support.

In this case, the trial court limited the parties' postsecondary support obligation to the cost of a public education. Such an award is within the trial court's discretion when it considers the statutory factors set forth in RCW 26.19.090(2). The resources of the parents, while a factor to be considered, are not dispositive. The trial court did consider the parents' resources in determining that the postsecondary support would cover the entire cost of education, rather than a portion of the cost. Denyse has not shown that the trial court abused its discretion in limiting the amount of support to the cost of a public education.

Denyse further argues that the trial court erred in refusing to impose postsecondary support retroactively and in finding that there was no jurisdiction to order support for Matthew based on his age. In Marriage of Gillespie, 77 Wn. App. 342, 344, 890 P.2d 1083 (1995), the mother filed a petition seeking modification of the father's child support obligation because the parties' son had turned 18 but was still in high school and dependent on the mother for financial

support. The trial court denied the petition on the ground that it lacked jurisdiction to modify the obligation order because the child had turned 18 before the petition was filed. Gillespie, 77 Wn. App. at 344. The decree contained language terminating the support obligation at the child's 18th birthday or when the child was no longer dependent on the wife (among other possible causes for termination of the obligation). Gillespie, 77 Wn. App. at 344. This court affirmed, holding that the trial court's authority to modify the decree did not continue beyond the child's 18th birthday when the decree terminated the obligation at that time. Gillespie, 77 Wn. App. at 345.

Likewise, the court cannot order postsecondary support for Matthew. The decree expressly provides that postsecondary support may be ordered, and thus extended the trial court's authority to issue a postsecondary support order beyond age 18 until the statutory age limit of 23. However, Denyse did not seek an order before Matthew's 23rd birthday. Although the decree does not limit postsecondary support to age 23, clear statutory language restricts the trial court's power to order postsecondary support beyond a child's twenty-third birthday, absent exceptional circumstances. RCW 26.19.090(5). Denyse has not shown any exceptional circumstance. Thus, once Matthew turned 23, the court had no jurisdiction to order postsecondary support for him. Cf. Marriage of Crossland, 49 Wn. App. 874, 875, 746 P.2d 842 (1987) (finding jurisdiction to modify decree that "provided support beyond the age of 18 for children enrolled as full-time students").

In addition, the trial court did not err in refusing to order payment of postsecondary support for expenses incurred before the petition was filed. The trial court held that its authority to provide retroactive postsecondary support was limited because the matter was before it as a petition for modification, which can only be prospective. While that was the procedural posture here, Denyse was not actually seeking "modification" as to postsecondary support issues but instead seeking to establish court-ordered "provisions" as envisioned in the existing order. However, although the decree created an obligation, it did not set out an enforceable postsecondary support order. The postsecondary support provision required either an agreement of the parties or provisions decided by the court. A "provision" is defined as "[a] stipulation made beforehand." Black's Law Dictionary 1262 (8th ed. 2004). Denyse has not shown any provisions decided by agreement or provisions decided by the court which could be enforced. There was no sufficient court order in place to modify, and the request to establish postsecondary support was untimely as to expenses already incurred prior to seeking the order.

We vacate the restriction on future enforcement of the previously ordered adjustment of support, and otherwise affirm.

Appelwick, C.J.

WE CONCUR:

Coleman, J. Ajid, J.